SUPREME COURT, U. S.

NOV 8 1967

JOHN F. DAVIS, CLERK

# Supreme Court of the United States

October Term, 1967

No. 802

C. C. PEYTON, Superintendent of the Virginia State Penitentiary,

*Petitioner,*

v.

ROBERT ELMER ROWE,

*Respondent.*

C. C. PEYTON, Superintendent of the Virginia State Penitentiary,

*Petitioner,*

v.

CLYDE MASON THACKER,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENTS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

Robert Y. Button
*Attorney General of Virginia*

Reno S. Harp, III
*Assistant Attorney General of Virginia*

Supreme Court Building
Richmond, Virginia 23219

## TABLE OF CONTENTS


| | Page |
|---|---|
| Preliminary Statement | 1 |
| Opinions Below | 2 |
| The Judgment | 2 |
| Jurisdiction | 3 |
| Question Presented | 3 |
| Statutes Involved | 3 |
| Statement Of The Case | 4 |
| Argument | 6 |
| Conclusion | 8 |
| Certificate Of Service | 9 |

Appendices


## TABLE OF CITATIONS

### Cases


| | |
|---|---|
| Jones v. Cunningham, 297 F. 2d 851 | 6 |
| Jones v. Cunningham, 371 U.S. 236 | 8 |
| McNally v. Hill, 293 U.S. 131 | 7 |
| Martin v. Commonwealth, 349 F. 2d 781 | 6 |
| Vialpando v. Patterson, No. 9195 (10th Cir., Sept. 19, 1967) | 8 |

*Page*

Whitley v. Cunningham, 205 Va. 251, 135 S.E. 2d 823 ..... 6

Williams v. Peyton, 372 F. 2d 216 ..... 6

**Statutes and Other Authorities**

28 U.S.C., Section 1254 ..... 3, 4

28 U.S.C., Section 2254 ..... 3

Section 8-596, Code of Virginia ..... 7

# Supreme Court of the United States

**October Term, 1967**

---

No. .....

---

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

*Petitioner,*

v.

ROBERT ELMER ROWE,

*Respondent.*

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

*Petitioner,*

v.

CLYDE MASON THACKER,

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENTS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

---

## PRELIMINARY STATEMENT

C. C. Peyton, Superintendent of the Virginia State Penitentiary prays that a writ of certiorari issue to review

judgments of the United States Court of Appeals for the Fourth Circuit entered on August 28, 1967, in the cases of Robert Elmer Rowe v. C. C. Peyton, Superintendent of the Virginia State Penitentiary, and Clyde Mason Thacker v. C. C. Peyton, Superintendent of the Virginia State Penitentiary. On September 14, 1967, the mandate in both cases was stated upon application of the Superintendent.

## OPINIONS BELOW

The memorandum order and opinion of the Supreme Court of Appeals of Virginia in the case of *Rowe* v. *Peyton,* decided on April 27, 1966, is not reported, but the same will be found in the appendix to this brief.

The opinion of the United States District Judge for the Western District of Virginia, Harrisonburg Division is not reported, and it will be found in Appendix II to this brief.

Clyde Mason Thacker did not pursue any remedies in the courts of the Commonwealth of Virginia, and consequently there is no State Court opinion.

The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, will be found in Appendix III to this brief.

The opinion of the court below has not yet been reported but will be found on Appendix IV of this brief.

## THE JUDGMENT

On September 14, 1967, an order was entered in the United States Court of Appeals for the Fourth Circuit staying the issuance and transmission of a certified copy of the judgment of that Court in the premises to permit the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court.

## JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case is grounded upon 28 U.S.C., Section 1254(1).

## QUESTION PRESENTED

**Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That State Prisoners May Attack In A Federal Court In a Habeas Corpus Proceeding A Sentence Which They Are Not Serving But Which Will Be Served In The Future And Which Does Not Effect The Validity Of Their Present Detention?**

## STATUTES INVOLVED

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646. 62 Stat. 967." (28 U.S.C., Section 2254)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States,

but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C., Section 1254)

## STATEMENT OF THE CASE

### CLYDE M. THACKER

### No. 11,217

Thacker attacks three sentences imposed upon him on November 16, 1953, in the Circuit Court of Hanover County. He pled guilty to each of the three charges of housebreaking, and his terms were suspended. He was represented by counsel, who he alleges was appointed on the same day. He further alleges that he was not represented by counsel at the time the suspended sentences were revoked.

At the time the petition was filed, Thacker was detained pursuant to a judgment of the Circuit Court of Buckingham County of September 17, 1964, wherein he was sentenced to serve a term of four years in the penitentiary, having been convicted of breaking and entering. This sentence expired on April 7, 1967, and he is presently detained pursuant to a judgment of the Corporation Court of the City of Charlottesville of October 9, 1964, wherein he was sentenced to serve one year in the penitentiary, having been convicted of statutory burglary. When he completes the service of this and other sentences imposed upon him by the Corpora-

tion Court of the City of Charlottesville, he will then commence to serve sentences imposed upon him in Greene, Albemarle, and Madison Counties. Thacker will not commence the service of the Hanover County sentences which he attacks until November 8, 1997, assuming that he continues to earn "Good Time" as provided for by Virginia law. The sentences which Thacker attacks do not prevent him from being eligible for parole, and if they were declared invalid, he would still not be eligible for parole.

He has not attacked the validity of the Hanover County sentences in any court of the Commonwealth of Virginia.

ROBERT ELMER ROWE

No. 11,072

Robert Elmer Rowe is presently detained pursuant to a judgment of the Circuit Court of Augusta County of June 18, 1963, wherein he was sentenced to serve a term of thirty years in the penitentiary, having been convicted of rape. He attacks the validity of a sentence imposed upon him on June 24, 1963, in the Circuit Court of the City of Waynesboro of twenty years for secreting a female.

He filed a petition for a writ of habeas corpus in the Supreme Court of Appeals of Virginia, which was denied because he was not serving the sentence, but the matters raised in the brief filed in this Court were not suggested to the Supreme Court of Appeals of Virginia.

Even if this twenty year sentence was declared invalid, his parole eligibility date would be August 24, 1969.

He attacks the validity of the Waynesboro sentence on the basis that he was ineffectively represented by counsel, who told him that if he entered a plea of guilty, the Waynesboro sentence would have to run concurrently with the Augusta County sentence.

## ARGUMENT

The Superintendent will demonstrate that the court below has ignored an established principle of law in reaching its decision in the premises. The question presented is a narrow one upon which this Court has previously ruled, and the decision below is contrary to the same. The court below has therefore exceeded the jurisdiction conferred upon it in the premises, and for that reason its decision should be reversed.

### I.

**The Court Erred In Holding That A Federal Court May Permit A State Prisoner To Attack A Sentence By Habeas Corpus To Be Served In The Future, Said Sentence Not Effecting The Validity Of His Present Detention.**

It is quite clear that both petitions state a prima facie case upon which they would be entitled to a plenary hearing, if they were serving the sentences of which they complain, under both State and Federal decisions. *Whitley* v. *Cunningham,* 205 Va. 251, 135 S.E. 2d 823; *Jones* v. *Cunningham,* 297 F. 2d 851.

The Superintendent does not raise any question of exhaustion in this proceeding.

The United States Court of Appeals for the Fourth Circuit has previously dealt with several fictions in the law in connection with its decisions in *Williams* v. *Peyton,* 372 F. 2d 216, and *Martin* v. *Commonwealth,* 349 F. 2d 781, in regard to sentences to be served in the future. Here, however, in both cases now before this Court the voiding of the sentences in question would not presently make the prisoners eligible for parole.

We have no argument with the statements contained in the opinion of the court below that it would be of benefit to the Commonwealth as well as to the prisoners that a speedy adjudication of their contentions be made. This

question was presented to the Virginia Advisory Legislative Council, which has been studying habeas corpus in the State courts. The report, which was released just prior to the decision of the court below but subsequent to the argument of these cases, recommends in part: "Prisoners should be permitted to file habeas corpus petitions, not only to challenge the legality of detention under a sentence currently being served but also to challenge on the basis of a sentence which has been suspended or is to be served following the current sentence. The Virginia Advisory Legislative Council recommended that § 8-596 of the Code of Virginia be amended to provide in part: "Such petition may allege detention without lawful authority to challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by the petitioner." This report has been made to the Governor of the Commonwealth of Virginia, and appropriate legislation will be submitted at the next session of the General Assembly of Virginia, commencing in January of 1968.

It is manifest that the procedures suggested relative to the possible amendment of the statutes are far better than amendment by judicial decree. This is what has occurred in the cases now before this Court. It is far better to permit the prisoner to attack a sentence to be served in the future as soon as possible after the conviction while the records are available and the memories of the individuals are clear. Moreover, if the prisoner is required to wait a long time to attack a sentence, the witnesses will be dead and his will be the only testimony available.

While we agree with the spirit of the decision, it is quite clear that it is contrary to this Court's decision in *McNally* v. *Hill*, 293 U.S. 131. In the cited case, this Court held that the writ lies only to attack the validity of a prsoner's pres-

ent detention. While the Court in *Jones* v. *Cunningham*, 371 U.S. 236, extended the rights under the writ, the case was predicated upon the fact that the prisoner was still in custody and that he was restrained of his liberty by the Parole Board. The court below cites no case in support of its position that *McNally* has been overruled, and it is submitted that that court was bound by this decision.

The United States Court of Appeals for the Tenth Circuit has had occasion to recently decide a similar case contrary to the decision in the court below. *Vialpando* v. *Patterson*, No. 9195 (10th Cir., Sept. 19, 1967). For the convenience of the Court this opinion will be found in an appendix to this brief. In the Tenth Circuit's opinion other cases are pointed out of lower Federal courts wherein the rule in *McNally* v. *Hill, supra*, has been followed.

In view of the fact that the decision in the court below is contrary to this Court's ruling in *McNally* v. *Hill, supra*, it is clear that this Court should grant the writ of certiorari to review the judgments and reverse the same.

## CONCLUSION

For the reasons stated herein, it is submitted that the writ of certiorari should be granted and the cases reversed.

Respectfully submitted,

ROBERT Y. BUTTON
*Attorney General of Virginia*

RENO S. HARP, III
*Assistant Attorney General of Virginia*

Supreme Court Building
Richmond, Virginia 23219

**CERTIFICATE OF SERVICE**

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 8th day of November, 1967, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Mr. John J. Kirby, Jr., 4201 S. 31st Street, Apartment 808, Arlington, Virginia, counsel for the petitioners herein.

RENO S. HARP, III
*Assistant Attorney General*